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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 196

AARON L. BILTCHIK AND FLORENCE W. BRILL, INDIVIDUALLY AND AS HOLDERS OF CLASS B DEBENTURES OF GREEN BAY AND WESTERN RAILROAD COMPANY, SUING ON BEHALF OF THEMSELVES AND ALL OTHER HOLDERS OF SAID DEBENTURES WHO MAY BE SIMILARLY SITUATED,

Petitioners,

vs.

GREEN BAY & WESTERN RAILROAD COMPANY, A WISCONSIN CORPORATION, AND C. LEDYARD BLAIR, CHARLES W. COX, ROBERT WINTHROP, H. E. McGEE AND RICHARD B. WILSON

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I

Statement

This is a petition for a writ of certiorari to review a judgment of the Supreme Court of the State of Wisconsin affirming, one judge dissenting, a judgment of the Cir-

cuit Court of Brown County, Wisconsin, dismissing the complaint upon its merits.

After trial before Honorable Henry Graass, Circuit Judge of Brown County, who was killed in an automobile collision before deciding it, the case was submitted for decision to Honorable Arold F. Murphy, Judge of the Twentieth Circuit, and a written decision dismissing the action on its merits was filed on the 14th day of May, 1946. The petitioners herein appealed to the Supreme Court of the State of Wisconsin and the Court, by Fowler, J., affirmed the judgment of the Circuit Court, which judgment was filed by the Clerk of the Supreme Court, Madison, Wisconsin, on April 8, 1947. Decision reported in 250 Wis. 177. Judge Fritz dissented without opinion.

The judgment of the Wisconsin Supreme Court is a final judgment.

This action was brought by Aaron L. Biltchik, et al., against Green Bay & Western Railroad Co. and its directors, on behalf of himself and all other holders of B debentures of Green Bay & Western Railroad Co. who may be similarly situated, to recover amounts which, by the terms of the debentures, are due and payable in lieu of interest.

The terms of the contract between the defendant railroad and the security holders are contained in the Certificate of Incorporation and in the B debentures.

The railroad has three classes of securities, provision for which was made in its Certificate of Incorporation under the statement of capital securities, as required by Section 180.02(d), Statutes of Wisconsin. These consist of:

1—Class A Income Debentures	$600,000
2—Common Stock	$2,500,000
3—Class B Debentures	$7,000,000

The A Debentures and common stock are preferred as to assets and as to distribution of net earnings available for dividends. Only the common stock is given voting rights.

The Class B Debentures have no maturity date and no fixed rate of interest, nor do they contain any provision for amortization or sinking fund payments. By their terms, the principal of the B debentures is payable only in the event of a sale or reorganization of the railroad and property of the company, and then only out of the net proceeds which may remain after the payment of any liens and charges and after payment of $600,000 to the holders of the Class A debentures and $2,500,000 to the stockholders.

The B Debenture holders are given no vote in the election of the directors or in the management of the corporation. There is no provision for any voice or vote by the B Debenture holders with respect to any sale of the railroad or property of the company. There is no underlying indenture and no trustee to act for the protection of the debenture holders. The Farmers Loan & Trust Company merely authenticates the debenture certificates.

Covenant Sued On

The Class B Debentures contain the covenant that until their payment the holders thereof

> ". . . shall in lieu of interest thereon participate in the distribution of annual net income to the following extent only, viz.:—So much of the annual net earnings of the said Company in any year as would be applicable to the payment of dividends on stock shall be applied as follows, viz.:—To the holders of Class A Debentures 2½ per cent upon the face value thereof, or if such annual net earnings are insufficient for the payment of the same, then all of such net earnings shall be distributed pro rata among the holders of said Class

A Debentures. After the payment of 2½ per cent upon the face value of Class A Debentures, the stockholders of the Company are entitled to receive the balance of such net earnings until 2½ per cent shall have been paid out of the same upon the par value of the said stock, and all surplus net earnings then remaining shall be paid to the holders of Class A Debentures and of the stock pro rata until five per cent shall have been paid upon the face value of said debentures and upon the par of said stock for such year, and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures pro rata. None of such payments shall be cumulative. The amounts, if any, payable upon this series of debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February, in the following year, and when so declared, any amount payable hereon will be paid at the office or agency of the Company in the City of New York on or before the first day of March, in such year to the holder of this debenture, . . . " (R. pp. 15-17 also 81-83).

All of these securities were issued in 1896 pursuant to a plan of reorganization following foreclosure proceedings, under decrees of foreclosure and sale rendered by the Circuit Court of the United States in and for the Eastern District of Wisconsin (R. pp. 19-20, 48).

Six hundred (600) A Debentures, having a face value of $1000 each, were issued for new capital. Twenty-five thousand (25,000) shares of common stock (par value $100 each) were issued to the holders of senior mortgage securities of the predecessor companies. Seven thousand (7000) B Debentures, having a face value of $1000 each, were issued to the holders of junior securities second mortgage bonds and preferred and common stock of said predecessor companies. At the conclusion of the reorganization, the assets of the railroad were valued at $10,100,000.

The securities representing this capitalization were listed in 1896 on the New York Stock Exchange and thereafter registered with the Securities & Exchange Commission under the Securities Exchange Act of 1934 (R. pp. 58-88 incl.) The defendant railroad at all times was under the jurisdiction of the Interstate Commerce Commission and filed annual reports with this body.

In the reorganization, the capitalization of the railroad was scaled down from about $16,200,000 to $10,100,000. Approximately $1700 in principal amount of mortgage bonds were surrendered for each $1000 B Debenture.

The petitioners commenced this action in the Circuit Court of Brown County, Wisconsin, on the ground that the directors had withheld payments of interest to the B Debenture holders in breach of the terms of the covenant contained in the debentures. The twenty-year Statute of Limitations having been held applicable, plaintiffs sought a judgment to compel the payment of $827,492.82 of net earnings of the defendant railroad for the years 1924 to 1944, inclusive, which had been withheld from the B Debenture holders. This amount, if recovered, would bring the B Debenture holders an average return of a little over one per cent per annum for the past twenty years, during which period they had received an average annual return of about one-half of one per cent. (See amended complaint, R. p. 10).

In connection with the question of "net earnings," which is vital to the determination of this case, it should be noted that this Court in *Williams et al.* v. *Green Bay and Western Railroad Company* (326 U. S. 549), reversing the Circuit Court of Appeals for the Second Circuit (147 Fed. 2nd 777) specifically left ". . . open the question of the proper construction of the 'net earnings' covenant in the Class B Debentures," as the only question then before this Court was the question of *forum non conveniens.*

Defendant's crucial defense is its fifth affirmative defense which alleges that the defendant railroad company is a common carrier; and that the Class B Debentures were issued by the railroad company in 1896 in connection with a plan of reorganization, following foreclosure, under the decree rendered by the Circuit Court of the United States in and for the Eastern District of Wisconsin. The crux of this defense is "that any and all annual net income otherwise available for distribution to Class B Debenture holders in any year mentioned in the amended complaint, in excess of such income as was actually so distributed in such year, was in fact and in the judgment of the Board of Directors of the railroad company, necessary to said company in order to provide for the current and prospective maintenance of its engines, cars, tracks and other equipment in such condition as adequately to accommodate the public and for the safe, adequate and efficient transportation and handling of passengers and freight, as was and is required of the railroad company by the laws, statutes and public policy of the State of Wisconsin, *and of the United States;* that any portion of net income not distributed and retained was due solely to said necessity and to the judgment of said directors that the said necessity existed; that under the correct construction of said Class B Debentures, said directors were neither required nor entitled to declare, or said railroad company to make, any distribution to Debenture holders of net income necessary to the railroad company for the above-mentioned purposes; and that any contrary construction of said Debentures, the applicable provisions of said Debentures themselves if so construed, and any decree or relief sought by the plaintiffs herein based upon such a construction, are and would be against public policy, illegal and void" (R. pp. 19-20; italics supplied).

At the very outset of the trial, in his opening to the Court, petitioners' counsel challenged the validity of this defense and stated that if it were a defense "it would be a violation of our contract and a violation of the constitutional rights under the Federal Constitution and also under the constitution of this State depriving us of property without due process of law" (R. pp. 183-184).

This defense is obviously erroneous in alleging that the defendant railroad company operates wholly within the State of Wisconsin. The evidence establishes, and the Court found, that the defendant corporation is a common carrier owning and operating railroad lines in Wisconsin and partly in Minnesota. (Findings of Fact Number 4; R. p. 6.) It is therefore an interstate carrier, and is under the jurisdiction of the Interstate Commerce Commission. Its reports filed with that body are in evidence (Plaintiffs' Exhibits 9, 10, 30-37 inclusive, R. pp. 23, 192; 24, 139; 52, 170-182).

The Wisconsin courts have sustained the fifth defense. Finding of Fact 12 is that all of the income of defendant corporation for the years 1924 to 1944, inclusive, other than the sums allocated and paid to the security holders was used in the public interest for additions and for the betterment of the defendant's railroad and to properly and adequately serve the public to meet competition and in the best interest of the security holders (R. p. 8). (See also Opinion of the Wisconsin Circuit Court at p. 4 of the Record.)

The Wisconsin courts have therefore held in effect that the Class B Debenture holders are not entitled to receive the interest which was promised to them by the contract contained in their bonds because the money has been used by the defendant corporation in maintaining its interstate railroad in competition with other railroads, in accordance with what is claimed to be the laws, statutes

and public policy of the State of Wisconsin and of the United States. It is submitted that the sustaining of this defense is a violation of the rights of the plaintiffs and other holders of the B Debentures under the Constitution of the United States, as impairing the obligation of their contracts and also taking their private property for public use without just compensation and depriving them of property without due process of law (U. S. Constitution, Article I, Section 10; Amendment XIV; Section 1; Amendment V).

We further submit that the defendant in its answer and the Courts below in their decisions have mistaken the "law, statutes and public policy of the State of Wisconsin and of the United States" upon which the decisions below obviously are based.

In the Wisconsin Supreme Court, replying to the contentions made in the brief of defendants-respondents (at pages 8 and 9) with respect to the supposed public interest applicable to a public carrier of passengers and freight under the Federal and State laws, plaintiffs stated, at page 6 of their reply brief: *

> "It is utmost in the public interest that faith in the integrity of railroad securities traded on public exchanges be maintained to the highest degree. Contractual obligations of railroad companies are not excepted from the constitutional guarantee against the impairment of the obligation of contract."

II

Jurisdiction of This Court

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925 (Title 28 U. S. C. A., Section 344(b)).

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* Certified copies of the brief of plaintiffs appellants in the Supreme Court of the State of Wisconsin, as well as of the brief of defendants-respondents and reply brief of plaintiff appellants in said Court have been lodged with the Clerk of this Court.

III

Questions Presented

1. Whether the construction by the Wisconsin Supreme Court of the B Debenture provisions impairs the obligation of contracts in violation of the Federal Constitution, Article I, Section 10.

2. Whether the construction of the B Debenture provisions and the judgment rendered thereon by the Wisconsin Supreme Court deprived the petitioners of property without due process of law, in violation of Amendment XIV, Section 1, of the Federal Constitution and Article I, Section 13 of the Wisconsin Constitution.

3. Whether the interpretation and construction of the B Debenture provisions by the Wisconsin Supreme Court denied the petitioners the equal protection of the laws in violation of Amendment XIV, Section 1, of the Federal Constitution.

4. Whether the Wisconsin Supreme Court was in error in construing the B Debentures as a non-voting common stock, notwithstanding that such a security was and is illegal under Section 182.15(1) of the Wisconsin Statutes; and contravenes the policies, provisions and regulations of the Interstate Commerce Commission and the Security Exchange Commission (Securities Act of 1933 and Securities Exchange Act of 1934).

5. Whether a State Court may determine independently "net earnings" and valuation of assets of an interstate railroad carrier contrary to public reports filed by it with a Federal Agency and contrary to the requirements and determinations of a Federal Agency created by Congress and given exclusive jurisdiction over such subject-matter.

IV

Reasons for Allowance of Writ

The construction of the B Debentures, the issues raised by the pleadings and the evidence introduced at the trial presented Federal questions of substance not heretofore determined by this Court, and decided by the Wisconsin Courts in a way probably not in accord with applicable decisions of this Court:

1. Defendant, by its "FIFTH" defense contained in its amended answer—

(a) raised the question of the construction by the Wisconsin State Courts of the terms of securities issued pursuant to a reorganization plan effectuated under a decree of the Circuit Court of the United States in and for the Eastern District of Wisconsin (R. pp. 19-20; Findings of Fact Nos. 7 and 8; R. p. 7);

(b) raised questions of the construction of the laws, statutes and public policy of the State of Wisconsin and of the United States (R. p. 20);

(c) raised the questions of whether the B Debenture, regardless of its clear language and intent, nevertheless did not require the railroad to distribute its net income, in accordance with its contract, and that such construction would be against public policy, illegal and void (R. p. 20);

(d) raised the question of the taking of private property for public use without just compensation, in violation of Amendment V of the Federal Constitution, and Article I, Section 13, of the Wisconsin Constitution, in that earnings belonging to debenture B holders under the contract were allegedly expended for improvements beneficial to the public using the railroad (Defendant's Answer, R. p. 20).

2. Other Federal questions of substance were raised by petitioners by the pleadings, briefs and evidence introduced in the Wisconsin Circuit Court:

(a) The question involving the construction of the net earnings' covenant in the Class B Debentures, which necessarily required a construction of the provisions relating to net earnings under the uniform system of accounts for railroads, as prescribed by the Interstate Commerce Commission, and by the Securities Exchange Act of 1934, was directly raised in the Wisconsin Circuit Court (R. pp. 22, 58; Plaintiffs' Ex. 6; R. pp. 23, 192, Plaintiffs' Ex. 9; R. pp. 24, 139, Plaintiffs' Ex. 10; R. pp. 52, 170-182, Plaintiffs' Ex.)0-36 inclusive; R. pp. 52-182, Plaintiffs' Ex. 37).

(b) The question of the interpretation of the net earnings' covenant of the B Debentures, as urged by the defendant railroad company and as found by the Wisconsin Courts, depriving the B Debenture holders of property without due process of law in violation of the Federal Constitution and Wisconsin Constitution, was directly raised by petitioners at the outset of the trial (See opening Statement p. 183).

3. The Class B Debentures are securities issued by an interstate carrier; are listed on a national exchange; are owned and held by a large number of persons; and are frequently bought and sold on the security markets (Finding No. 15, R. p. 8); (Plaintiffs' Exhibit 5, R. pp. 22, 54). This case, therefore, is one of large public importance involving the rights of the investing public of the several States, and is therefore a matter of Federal concern. Furthermore, the decision of the Wisconsin Supreme Court is contrary to the decisions in other State Courts and in some of the Federal Courts in analogous cases.

4. The Supreme Court of Wisconsin has decided contrary to the well established formulae and rules of the Inter-

state Commerce Commission with respect to allowable deductions whereby net earnings are determined, that the directors of the defendant may, after making distribution of such net earnings to the Class A Debentures and common stock, make still further deductions, thereby leaving little or nothing to be paid to the B Debentures, thus depriving the holders of the B Debentures of property without due process of law in contravention of the Federal Constitution (Wisconsin Supreme Court Opinion, R. p. 185).

5. Although the B Debentures are registered with the Securities and Exchange Commission as debentures and in fact are listed on the New York Stock Exchange as debentures, the Supreme Court of Wisconsin, contrary to the statutes of Wisconsin and the rules and regulations of the said Securities Exchange Commission and the New York Stock Exchange, has decided that the B Debentures are in the nature of non-voting common stock. Since the Securities and Exchange Commission will not, in reorganizations, permit the issuance of nor register non-voting common stock and the New York Stock Exchange will not list non-voting common stock, and since the defendants' Certificate of Incorporation filed pursuant to the Statutes of Wisconsin does not provide for the issuance of non-voting common stock, the determination of the Supreme Court of Wisconsin will permit the violation and evasion of the aforesaid laws and regulations, to the great detriment and loss of the investing public of our several States.

6. This Court should review the decision of the Wisconsin Supreme Court in that its decision permits the defendant, an interstate railroad carrier, to avoid the accounting rules and regulations of the Interstate Commerce Commission regarding deductions from income or reserves for replacements and improvements, so that the railroad may have one figure of net profits available for dividends to the

Class A Debentures and common stock for reporting to the Interstate Commerce Commission and the Securities and Exchange Commission and in fact another and lower figure with respect to the B Debentures, thereby impairing the clear contractual rights of said security holders in contravention of their Federal and State constitutional rights.

7. All the questions involved in this case should be uniformly settled by this Court in order to avoid multiplicity of suits and conflict between the various State Courts. The decision of the Wisconsin Supreme Court and of the New York Supreme Court, where another bondholders' action is pending (*Sperling* v. *McGee,* Supreme Court, Kings County), would not be binding upon the Courts of the other States wherein any individual debenture "B" holder might institute an action involving the construction of the said debenture.

8. Since the construction by the Wisconsin Supreme Court of the B Debentures, creates a security which contravenes the stated policies of Congress as expressed in the legislation creating and affecting the Interstate Commerce Commission and the Securities and Exchange Commission, and since these securities are held and traded in by a large number of investors in the several States, this Court should make a final determination on the merits and make a uniform ruling of the nature of the said security and the contractual rights accruing thereunder to holders of said securities. It is submitted that the Federal questions raised herein cover the whole case and are of such a nature that the rights of the parties cannot be finally determined without deciding them.

9. This Court should determine to what extent the policy of present-day Federal legislation regulating the issuance and sale of and trading in widely held securities,

particularly those of interstate railroad carriers, demands and requires a uniform construction of the terms of such securities by the courts and the regulating bodies of our several States and of the United States.

WHEREFORE, your petitioners respectfully pray that this petition for writ of certiorari be granted to review the judgment of the Supreme Court of the State of Wisconsin, that the said judgment be reversed, and that your petitioners have such other and further relief as in the premises may be just.

Dated: July 2, 1947.

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FLORENCE W. BRILL,
Petitioners,

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Jurisdiction

The statement of jurisdiction is set forth in the foregoing petition.

The Opinions Below

The opinion of the Circuit Court of Brown County, Wisconsin, thus far apparently unreported, is printed in the record at page 1.

The opinion of the Supreme Court of Wisconsin is reported in 250 Wis. 177.

Statement of the Case

The facts of the case are as set forth in the foregoing petition and as detailed hereafter.

ARGUMENT

Point I

The Wisconsin courts erred in sustaining the contentions raised by the defendants in their answer and brief that under the laws, statutes and public policy of the State of Wisconsin and of the United States, the defendant Railroad Company was not required to pay in lieu of interest on the B Debentures its undistributed earnings in each year as shown on its reports to the Interstate Commerce Commission.

This action is based upon a covenant contained in the bonds of the defendant, an interstate railroad company, for payments in lieu of interest.

The defendants-respondents in their brief filed in the Supreme Court of Wisconsin and in their answer recognized that a Federal question is involved in this proceeding. Their "Fifth Defense" is based upon "the laws, statutes and public policy of the State of Wisconsin and *of the United States.*" (Emphasis supplied.) They contend that such laws, statutes and public policy excused them as an interstate common carrier of passengers and freight from

paying to the Class B Debenture holders the annual net income otherwise available for distribution to them in excess of such income as was actually so distributed, notwithstanding the clear language of the covenant sued on.

That covenant clearly and expressly provides that in lieu of interest, the holders of the B Debentures shall participate in the distribution of annual net income to the following extent only, viz.: so much of the annual net earnings in any year as would be applicable to the payment of dividends on stock shall be applied first to payments on the A Debentures and stock up to five per cent on each, "and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures pro rata."

The unmistakable meaning of that covenant is cogently presented by Circuit Judge Jerome Frank in his dissenting opinion in *Williams* v. *Green Bay & Western R. Co.* (C.C.A., 2d Cir.) 147 Fed. (2d) 777, reversed 326 U. S. 549, 90 L. Ed. 247, where he said at page 781:

> "I see no basis for any suggestion that the directors are given any discretion in fixing the amount to be paid. The instrument expressly provides that it is to be computed by deducting from the net income the amount paid on the capital stock and the amount paid on the Class A Debentures. The resulting sum is to be paid to the Class B Debenture-holders. Nor are the directors given any discretion as to whether or not that sum is to be paid to the Class B Debenture-holders. The instrument declares that '*the amount payable will be* fixed and *declared* by the Board of Directors.' Under such a provision, a resolution by the directors would be purely ministerial. Cf. *Crocker v. Waltham Watch Co.*, 315 Mass. 397, 53 N. E. (2d) 230; *Wood v. Lary*, 47 Hun. 550, app. dismissed 125 N. Y., 83, 26 N. E. 338; *Burke v. Ottawa Gas & Electric Co.*, 87 Kans. 6, 123 P. 857, Ann. Cas. 1913 D, 772. The obligation of defendant to

> make payment of the amounts withheld is therefore, I think, complete without any resolution." (Italics by Judge Frank.)

In the *Williams* case, *supra,* this Court said at 326 U. S. 552:

> "We leave open the question of the proper construction of the 'net earnings' covenant in the Class B Debentures."

The only question before the Supreme Court in that case was the question of *forum non conveniens.*

The Wisconsin Courts have now held that the laws, statutes and public policy of Wisconsin and of the United States applicable to interstate common carriers require a construction which deprives the holders of B debentures of the income in lieu of interest, which is promised to them by their bonds and which concededly is otherwise available to them.

This question of the requirements of the supposed public interest under the applicable Federal and State laws was urged by the defendants-respondents in their brief in the Wisconsin Supreme Court. Under Point II of that brief, they stated at pages 8 and 9:

> "Unless the language of the debentures be construed as vesting the directors with discretion as to the amount of net earnings to be paid out as dividends or distributions to security holders, the railroad company could not long maintain its railroad so as to perform the ever increasing service to the public *which a public carrier of passengers and freight must maintain under the applicable Federal and State laws.* (Italics supplied.)

In answer to this, plaintiffs-appellants stated in their reply brief in the Wisconsin Supreme Court at page 6:

"REPLYING TO RESPONDENTS' POINT II:

"PUBLIC INTEREST REQUIRES THAT THE SOLEMN OBLIGATIONS OF RAILROAD CORPORATIONS BE PERFORMED AND ENFORCED SO THAT THE CREDIT OF RAILROADS MAY BE UNIMPAIRED.

> "The argument of public interest can hardly excuse a railroad from performing its contract. The public interest certainly requires that the confidence of investors in the enforcement of the solemn obligations of railroad corporations as expressed in their bonds or debentures listed on securities exchanges should not in any way be impaired. It is utmost in the public interest that faith in the integrity of railroad securities traded on public exchanges be maintained to the highest degree. Contractual obligations of railroad companies are not excepted from the constitutional guarantee against the impairment of the obligation of contracts."

The Wisconsin Courts sustained defendants' contentions. (See opinion Wisconsin Circuit Court at p. 4; see also Finding of Fact No. 12 at R. p. 8.)

The earnings of the defendant railroad, which are sued for herein in lieu of interest, are those which are shown on the reports filed by the defendant corporation with the Interstate Commerce Commission as well as with the Securities and Exchange Commission, the Wisconsin Public Service Commission and the New York Stock Exchange. (Exhibit 9, R. pp. 23, 192; See brief of defendants-respondents in Wisconsin Supreme Court at p. 4.)

The Interstate Commerce Act, 49 U.S.C.A., Secs. 1 *et seq.*, regulates railroads engaged in interstate commerce. This is the Federal Statute to which the defendants apparently referred in their "Fifth Defense" and in their brief in the Wisconsin Supreme Court. This Act also requires that reports containing certain information be filed and that a uniform system of accounts be kept. (Section 20 (1) sets up the requirements to be contained in such annual reports.)

The question presented is, therefore, whether anything in this Statute or in any other Federal Statute or public policy justifies sustaining the contentions raised by the defendants in their "Fifth Defense" upon which the decisions of the Wisconsin Courts rest.

In holding that the B Debenture holders are not entitled to these earnings, the Wisconsin Courts have failed to give effect to the defendants' interpretation of the Debentures as contained in their registration statement filed with the Securities and Exchange Commission and in their listing with the New York Stock Exchange. (Exhibits 5 and 6, R. pp. 22, 54-55, R. pp. 22, 60.)

The construction of the B Debentures by the Wisconsin Courts is contrary to the decisions of other courts in similar cases.

See:

Central Georgia Ry. Co. v. *Central Trust Co. of N. Y.*, 135 Ga. 472;

Cratty v. *Peoria Law Library Association*, 219 Ill. 516;

Lydia E. Pinkham Medicine Co. v. *Gove*, 303 Mass. 1;

Crocker v. *Waltham Watch Co.*, 315 Mass. 397;

Thomas v. *N. Y. & G. L. R. Co.*, 139 N. Y. 163;

Mackintosh v. *Flint & F. M. E. R. Co.*, 34 Fed. 582, at pp. 600-601;

New England Trust Co. v. *Penobscot Chemical Fibre Co.* (Me.), 50 Atl. 2d 188;

Cintas v. *American Car & Foundry Co.*, 131 N. J. Eq. 419, aff'd 132 N. J. Eq. 460;

Ballantine, Corporations (1946 edition), p. 517; citing Hicks, Rights of Non-Cumulative Preferred Stock—A Doubtful Decision by the United States Supreme Court, 5 Temple L. Q. 538, and Stevens, The Discretion of Directors in the Distribution of Non-cumulative Preferred Dividends, 24 Geo. L. J. 371.

The defendants having asserted rights, titles, privileges and immunities under the laws, statutes and public policy of Wisconsin and of the United States, which they claim require a construction of the contract contained in the B Debentures excusing them from making distribution of the available earnings to the B Debenture holders, and such Federal claim having been sustained by the Courts of Wisconsin, this Court may review that determination under the express provisions of Section 237 (b) of the Judicial Code, as amended, 28 U. S. C. A., Sec. 344.

This is so even though the judgment of the State Court may rest partly upon grounds of local or general law.

See:

West Chicago Street R. Co. v. *Illinois, ex rel., Chicago*, 201 U. S. 506;
U. S. Mortgage Co. v. *Matthews*, 293 U. S. 232.

The broad Federal questions concerning interstate railroads, which are raised by the "Fifth Defense", constitute the very foundation of the judgment for the defendants. The first two defenses raised only questions of the Statute of Limitations. The twenty year Statute was held applicable, so that the claims for the years 1924 and subsequent thereto are not barred. The "Third" and "Fourth" defenses are based upon laches and estoppel. The courts below expressly held that these defenses were not tenable. (R. p. 1.)

It is, therefore, apparent that the decisions below rest entirely upon the contentions raised by the "Fifth" defense and urged by the defendants in their brief that because the defendant railroad is an interstate common carrier of passengers and freight, the laws, statutes and public policy of the United States, as well as those of Wisconsin, require a construction of the B Debentures which deprives the hold-

ers of the income which would otherwise be available to them and which they are entitled to by the terms of their bonds.

This clearly is a Federal question of substance not heretofore determined by this Court.

Point II

The decisions below are repugnant to and conflict with the public policy of the United States as expressed by Congress in legislation and by Federal agencies.

The Supreme Court of Wisconsin determined that the B Debenture is in the nature of a non-voting common stock. It should be remembered that the defendants stress the fact that these debentures were issued in a railroad reorganization effected under a decree of foreclosure of the United States Circuit Court. It is submitted that the Supreme Court of Wisconsin has in effect created a new and different security from the one purchased for value by the B Debenture holders throughout the United States, for one which is repugnant to and conflicts with the statutes and public policy of the United States.

Thus the Bankruptcy Act, Section 216, requires that the charter of a reorganized corporation shall contain provisions prohibiting the issuance of non-voting stock.

Several states have prohibited the issuance of non-voting common stock. Notably among these is the State of Illinois, where the same is prohibited by the State Constitution.

In an opinion of the *Attorney General of Wisconsin*, 23 Atty. Gen. 6, it was held that preferred stock may not be given an exclusive right to vote. Thus, it is recognized that to give a senior security exclusive voting rights is repugnant to all concepts of property ownership.

See:

Section 182.15 of the Wisconsin Statutes;
Public Utility Holding Company Act of 1935, Section 7 (c) (1);
Nickel Plate Unifications, 105 I. C. C. 425;
Ballantine, Corporations (1946 Edition), pp. 418-419 on the evils of non-voting common stock, cites *Lord* v. *Equitable Life Assur. Soc. of United States*, 194 N. Y. 213, 228.

It is significant also that the New York Stock Exchange refuses to list non-voting common stock. It is also significant that the securities are called Debentures but do not have the protection of a Trustee or Indenture. The Trust Indenture Act of 1939 (15 U. S. C. A., Section 77 (bbb)) specifically recognizes the evil of separating ownership from control.

The effect of the decision below is to reduce the solemn Debenture obligations of defendant railroad corporation to a most illusory form of security and to leave the holders of the $7,000,000 Class B Debentures wholly at the mercy of the directors elected solely by and representing the stockholders. Eighty per cent of the stock is owned by a small group, mostly by the New York banking firm of Robert Winthrop & Company, who elect the directors and control the defendant railroad company (R. p. 36). The directors themselves own stock and a majority of them are connected with Robert Winthrop & Company (R. p. 36).

The Class B Debentures are the junior security, subordinate even to the stock. In this respect, as well as in others, they differ from other income bonds and from preferred stock, where it is provided that no dividends can be paid on the common stock unless payments are made on the income bonds or the preferred stock. Such *senior* securities

are protected by the fact that the common stock, which elects the directors and thereby controls the company, must provide for payment of the senior securities before anything can be paid on the common stock. The holders of the B Debentures of defendant railroad company, however, do not have any such protection because they are the *junior* securities and the stockholders, who have the sole vote and who alone elect the directors, need not be concerned with the B Debenture holders.

Having no vote in the election of directors, who, it has been held below, have the sole discretion in determining what is to be paid in interest on the B Debentures, if anything, the B Debenture holders do not have the protection which stockholders usually have of being able to elect new directors, if they are dissatisfied with the dividend policy. Defendant corporation and its directors have consistently declared and paid in almost every year all of the earnings of the defendant railroad to the A Debenture holders up to the maximum of five per cent. The stockholders have received their full five per cent in almost every year. (Exhibit 15, p. 27.)

During the past twenty years, the B Debenture holders have received interest payments averaging only a little over one-half of one per cent per annum (R. p. 42).

Point III

The construction by the Wisconsin courts of the contract involved herein deprives the B Debenture holders of their rights under the Federal Constitution.

In their "Fifth Defense," defendants relied upon the laws, statutes and public policy of Wisconsin, as well as those of the United States, as excusing the defendant railroad from paying to the B Debenture holders the income required to be paid to them by the clear language of the

contract contained in the Debentures and in the articles of incorporation of defendant railroad. (Exhibit D-1 forming part of Exhibit 6 in Evidence; (R. pp. 66, 67.)

There was also necessarily involved the construction of the Wisconsin Corporation Statutes. (Sec. 180 of the Wisconsin Statutes.)

The holding of the Wisconsin Courts that the defendant railroad need not pay the available earnings to the B Debenture holders, as required by the terms of their contracts, because the railroad needed the money for other purposes, is clearly an impairment of the obligation of contracts, and deprives the Debenture holder of property without due process of law.

United States Constitution, Article I, Section 10;
United States Constitution, Fourteenth Amendment.
See: *Tidal Oil Company* v. *Flanagan*, 263 U. S. 444, particularly at p. 453;
West Chicago Street R. Co. v. *Illinois ex rel. Chicago*, 201 U. S. 506, particularly at page 519.

Moreover, the effect of the decisions below is to permit the defendant railroad company to take the private property of the Debenture holders for a public use—the improvement of the railroad—without just compensation. This deprives the Debenture holders of their property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Rights based on contracts between security holders and railroads must be determined by the same rules of construction as contracts between other parties. The clear language of a contract obligation applies to all individuals and corporations alike. The discrimination in favor of a particular person or business is clearly a denial of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

Conclusion

The Petition for a writ of certiorari, as prayed for herein, should be granted.

Respectfully Submitted,

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(2143)

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IN THE

Supreme Court of the United States

OCTOBER TERM 1947.

No. 196

AARON L. BILTCHIK and FLORENCE W. BRILL, individually and as holders of Class B Debentures of Green Bay and Western Railroad Company, suing on behalf of themselves and all other holders of said Debentures who may be similarly situated,

Petitioners,

against

GREEN BAY & WESTERN RAILROAD COMPANY, a Wisconsin Corporation, and C. LEDYARD BLAIR, CHARLES W. COX, ROBERT WINTHROP, H. E. McGEE and RICHARD B. WILSON,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CADWALADER, WICKERSHAM & TAFT,
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IN THE

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Opinions Below.

The opinion of the Circuit Court of Brown County, Wisconsin, is not reported. It is printed in the record at page 1.

The opinion of the Supreme Court of Wisconsin is printed in the record at page 185 and is reported in 250 Wis. 177 and 26 N. W. 2d 633.

Statement of the Case.

The respondents do not subscribe to the statement of the case, as set forth in the petition herein, nor to the arguments of petitioners improperly incorporated therein.

This action, a representative action for all holders of Class B Debentures, was brought by the petitioners in the Circuit Court of Brown County, Wisconsin, to seek an interpretation, under Wisconsin law, of the language of the Class B Debentures, which, without permitting discretion to be exercised by the Directors, petitioners claimed would force the defendant Railroad Company to pay to the holders of Class B Debentures all surplus earnings for each year during the past twenty years, after annually paying to the holders of the Common Stock and of the Class A Debentures, five per cent of the base amount thereof. The amount claimed would amount to more than $1,000,000.

The respondents' construction of the language of the Debentures, upheld by the Courts below, is that the Directors of the defendant Railroad Company were vested with discretion in the distribution of such net income such as ordinarily is exercised with respect to the payment of dividends. In the exercise of such discretion, the Directors authorized the payment of more than $1,300,000 thereof to the holders of the said Class B Debentures (R. 13) and approved the expenditure of more than $2,000,000 thereof for betterments and improvements of the railroad. It is not disputed that such expenditures were necessary to meet competition and to enable the railroad to continue as a going concern (R. 8, 32). The expenditures also inured to the benefit of the said Class B Debenture holders in that their equity was increased by more than $2,000,000 (R. 8).

The uncontradicted proof established that the Class B Debentures were issued in 1896, pursuant to a plan of reorganization following foreclosure, and that no cash was paid for them and that they were delivered in exchange for second mortgage bonds and common and preferred stock of the old company (R. 7).

The Court below, the Supreme Court of Wisconsin, referring to the said foreclosure action said:

> "* * * It is clear from the undisputed evidence that had the foreclosure suit proceeded in the common course of practice to sale of the mortgaged property neither the holders of the second mortgage bonds nor the stockholders of the old company would have received anything. The scheme of reorganization was manifestly planned to assure that the holders of the subordinate securities should receive nothing whatever until the holders of the new Class A Debentures and the new stock were compensated both through current income and on liquidation of the new corporation, and this must be borne in mind in construing the provisions of the Class B Debentures on which the suit is based" (R. 187).

POINT I.

This Court has no jurisdiction of this cause in that no federal question was presented to or decided by the Court below, the Supreme Court of Wisconsin.

A. This Court has held that the decision of a federal question by the Court below is a jurisdictional requirement.

In the leading case of *Lynch* v. *New York, ex rel. Pierson,* 293 U. S. 52, this Court held that the essential elements of this Court's jurisdiction are as follows:

> 1. That a federal question was presented for decision to the Court below.
>
> 2. That the decision of such question was necessary to the determination of the cause.
>
> 3. That such federal question was actually decided or that the judgment as rendered could not have been given without deciding it.

We quote the relevant portion of the opinion in that case, delivered by the former Chief Justice, Mr. Justice Hughes, viz.:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause and that it was actually decided or that the judgment as rendered could not have been given without deciding it." (Citing cases.)

The said case was quoted and followed in the case of *Radio Station WOW, Inc. et al.* v. *Johnson,* 326 U. S. 120, at page 129. The opinion therein was delivered by Mr. Justice Frankfurter.

See also *Honeyman* v. *Hanan,* 300 U. S. 14, 18.

B. The decision of the Court below involved no federal question. It was confined to a construction of the Class B Debentures.

A reading of the decision of the Court below (R. 185) readily demonstrates that no federal question was involved. The Court construed the contract, the Class B Debenture. It quoted a covenant, contained in the Debenture (R. 187), and further stated, viz.:

> "Not only this provision but two other provisions of the Class B Debentures must be considered."

The Court then proceeded to analyze those provisions and reached the conclusion that the language of the Debentures be construed as vesting the directors with discretion in distributing the earnings of the Railroad Company.

The decision is in the same category as thousands of cases in the courts of this country, construing contracts and ascertaining the intent of the parties.

No federal question and, in fact, no question was decided by the Wisconsin Court other than the construction of the Class B Debentures.

The petitioners argue that the fifth and last defense in respondents' answers (R. 19, 21) raised a federal question. On the contrary, the respondents alleged, in substance, that they were engaged in the transportation business and that all available income was necessarily expended in perfecting the equipment for the proper service of the Railroad's customers, the public. The testimony of Mr. McGee

the President of the Railroad Company, to that effect, was not disputed (R. 32). The opinion of the Trial Judge (R. 4) and the opinion of the Wisconsin Supreme Court (R. 189), state that the testimony was not disputed. The finding of fact on this point (R. 8), is as follows, viz:

> "12. That all of the income of the defendant corporation for the years 1924 to 1944 inclusive, other than the sums paid to the security holders, was used and necessarily used in the public interest for additions and for the betterment for the defendant's railroad and to properly and adequately serve the public, to meet competition and in the best interest of the security holders."

It is obvious that no federal question was involved.

C. If the decision of the Court below rested upon a non-federal question and a federal question and its does not appear upon which ground the judgment was based, this Court will not take jurisdiction.

If the Supreme Court of Wisconsin determined not only a construction of the Class B Debentures under Wisconsin law but also determined a federal question, this Court will not take jurisdiction, under the authority of *Lynch* v. *New York, ex rel. Pierson, supra,* wherein this Court said, p. 54:

> "* * * Where the judgment of the State Court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

The case of *Fox Film Corp.* v. *Muller,* 296 U. S. 207, is particularly in point. The action pertained to the construc-

tion of a contract, the same issue involved in the instant case. The defendant set up the invalidity of the contract under the Sherman Anti-Trust Act. The court at page 211 said:

> "* * * The construction put upon the contracts did not constitute a preliminary step which simply had the effect of bringing forward for determination the federal question, but was a decision which automatically took the federal question out of the case if otherwise it would be there. The non-federal question in respect of the construction of the contracts, and the federal question in respect of their validity under the Anti-trust Act, were clearly independent of one another. See *Allen* v. *Southern Pacific R. Co.*, 173 U. S. 479, 489-492. The case, in effect, was disposed of before the federal question said to be invloved was reached. *Chouteau* v. *Gibson*, 111 U. S. 200; *Chapman* v. *Goodnow*, 123 U. S. 540, 548. A decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear."

The petitioners have failed to conform to and comply with the decisions of this Court setting forth the essentials of jurisdiction on certiorari.

POINT II.

Six Courts have construed the Class B Debentures and they have all interpreted the said debentures as vesting the directors with discretion.

Those decisions are as follows, viz.:

1. *Green Bay and Western Railroad Company* v. *Commissioner of Internal Revenue*, 3 T. C. 372 (1944).

2. *Green Bay and Western Railroad Company* v. *Commissioner of Internal Revenue,* 147 Fed. (2d) 585 (C. C. A. 7th—1945).

3. *Williams* v. *Green Bay & Western Railroad Company,* 147 Fed. (2d) 777 (C. C. A. 2d—1945).

4. *Williams* v. *Green Bay & Western Railroad Company,* 68 Fed. Supp. 509 (U. S. D. C. Southern District of N. Y.).

5. *Biltchik* v. *Green Bay & Western Railroad Company,* Circuit Court of Brown County, Wisconsin. The decision is unreported. It is printed in the Record at page 1.

6. *Biltchik* v. *Green Bay & Western Railroad Company,* 250 Wis. 177, 26 N. W. 2nd 633.

POINT III.

The petition for a writ of certiorari to this Court should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 196.

AARON L. BILTCHIK and FLORENCE W. BEILL, Individually and as Holders of Class B Debentures of Green Bay and Western Railroad Company, Suing on Behalf of Themselves and All Other Holders of Said Debentures Who May Be Similarly Situated,

Petitioners,

vs.

GREEN BAY & WESTERN RAILROAD COMPANY, a Wisconsin Corporation, and C. LEDYARD BLAIR, CHARLES W. COX, ROBERT WINTHROP, H. E. McGEE and RICHARD B. WILSON,

Respondents.

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No. 196.

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Petitioners,

vs.

GREEN BAY & WESTERN RAILROAD COMPANY, a Wisconsin Corporation, and C. LEDYARD BLAIR, CHARLES W. COX, ROBERT WINTHROP, H. E. McGEE and RICHARD B. WILSON,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Replying to Respondents' Statement of the Case.

Respondents erroneously state that this action was brought by petitioners to seek an interpretation under Wisconsin law of the language of the Class B Debentures. Petitioners, residents of New York (R., p. 11), sued in Wisconsin to recover the amounts due in lieu of interest on the Class B Debentures of defendant interstate railroad corporation. The Debentures expressly provide that the amounts payable thereon will be paid at the office or agency of the company in the City of New York, that they shall pass by delivery unless registered on the books of

the company at its office or agency in the City of New York, and that the Debentures shall not be valid for any purpose unless authenticated by the signature of the Farmers Loan and Trust Company (R., p. 16), a New York banking corporation. On familiar and elementary principles the Debentures are therefore governed by the laws of New York.

The B Debentures are registered with the Securities and Exchange Commission and listed on the New York Stock Exchange (Exhibits 5 and 6; R., pp. 54, 58); they are owned and held by a large number of persons and are frequently bought and sold on the security markets, and the question in the action is one of common or general interest to all owners of such Debentures (Finding of Fact 15; R., p. 8).

The New York plaintiffs brought suit in defendant's home state of Wisconsin to avoid unnecessary litigation of questions of jurisdiction and of *forum non-conveniens*.

See:

Sperling v. *McGee*, 268 App. Div. 925, 51 N. Y. Supp. 2nd 274;

Cf. *Williams* v. *Green Bay & Western R. R. Co.*, 326 U. S. 549.

In this action on bonds payable in New York, the Wisconsin courts have given judgment *on the merits* against the New York plaintiffs (R., pp. 5, 10, 185), because they found that defendant is an inter-state common carrier operating railroad lines in Wisconsin and Minnesota and that all of its income, other than the sums allocated and paid to the security holders, was used and necessarily used in the public interest for additions and betterments to defendant's railroad

and to properly and adequately serve the public, to meet competition and in the best interest of the security holders. The Wisconsin courts thus sustained the Fifth Defense in which defendants raised federal questions (R., pp. 19-20; Findings of Fact 1, 4, 12; R., pp. 6, 8).

The amounts sued for, which are promised to the bondholders in lieu of interest by the terms of the Debentures, are the surplus earnings of the railroad as shown in its reports to the Interstate Commerce Commission, after substantial deductions for maintenance, depreciation and reserves for betterments and after provision for payment of five percent on the par value of the A Debentures and stock (R., pp. 22-30; Exhibits 9, 10, 11, 12, 14, 15; R., pp. 138, 139, 161, 164, 192, 234).

During the past twenty years, the average return of the B Debenture holders has been a little over one-half of one-percent per annum. If they recover herein, their average return will be brought up to about one percent per annum (R., p. 42).

Replying to Respondents' Point I.

In view of their Fifth Defense (R., pp. 19-20) and their argument in their brief in the Supreme Court of Wisconsin (quoted at page 18 of our Brief in Support of Petition for Certiorari herein) respondents cannot very well contend that no federal question was *presented* below.

Respondents contend, however, that the *decision* below involves no federal question, or that it rested on both a non-federal question and a federal question and that it does not appear upon which ground the

judgment was based (B and C of Respondents' Point I).

We submit however that the judgment below as rendered could not have been given without deciding the federal questions in favor of defendants, and that the judgment cannot be supported by any independent and adequate non-federal ground.

In form, the Wisconsin courts construed the B Debentures. In substance and effect, they held that the B Debenture holders cannot recover the money expressly promised them by the Debentures in lieu of interest, because defendant is an interstate railroad company and it needed and used the money for the betterment and improvement of its railroad "in competition with other railroads of the same class" and "in the public interest" (R., pp. 4, 189). The Wisconsin Supreme Court emphasized that "The defendant is a railroad corporation and as such it is the duty of its directors to keep it in proper operation and to pay the expenses of such operation and of maintaining its physical property in condition requisite for such operation * * *" (R., p. 189).

Defendant proved that it is an inter-state common carrier in competition with other inter-state railroads and that most of its business consists of through interstate traffic (R., p. 31),* and also submitted evidence in support of its contention that the money sued for was used by it "in the public interest" for betterments and improvements of its railroad to enable it to compete in interstate commerce (R., pp. 30-52). The court

* The Fifth Defense erroneously states that defendant owns and operates lines of railroad entirely within the State of Wisconsin (R., p. 19). This same erroneous impression was apparently conveyed to this Court in *Williams* v. *Green Bay & Western R. Co.*, 326 U. S. 549, at pages 559-560.

found in accordance with defendants' contentions in these respects (Findings of Fact 1, 4 and 12; R., pp. 6, 8).

This evidence and these findings were material only to the Fifth Defense. Plaintiffs were suing on an absolute contract to pay money. No claim of abuse of discretion was pleaded by plaintiffs, nor was any such issue tendered or litigated by plaintiffs (R., pp. 10, 183).

Finding 12 (R., p. 8), stressed in Respondents' brief herein, obviously deals only with Federal questions. See Interstate Commerce Act, 49 U. S. C. A., Section 1.

Moreover, the constitutional question was presented and necessarily decided as to whether the alleged necessity of this corporation to use the money for betterments and improvements of its interstate railroad running through Wisconsin and Minnesota so as to comply with the claimed "laws, statutes and public policy" of Wisconsin and of the United States, could excuse it from performing the terms of its contract authenticated in New York to pay that money in New York to New York residents (R., pp. 183-184).

The Wisconsin Supreme Court also "bore in mind" what it considered to be the "scheme of reorganization" in the United States Circuit Court for the Eastern District of Wisconsin in 1896, as a part of which the B Debentures were issued (R., p. 187). That can hardly be said to be a non-federal ground; certainly it is not an independent non-federal ground of sufficient breadth to sustain the judgment without decision of a federal question.

Any non-federal grounds which may have entered into the "construction" of the Debentures are mingled with the federal questions and are not independent,

substantial or sufficient to support the judgment. In the absence of an independent, adequate non-federal ground, this Court should take jurisdiction.

See:

State Tax Commission v. *Van Cott,* 306 U. S. 511, at p. 514;
Abie State Bank v. *Bryan,* 282 U. S. 765, at p. 773;
Williams v. *Kaiser,* 323 U. S. 471, at pp. 477-478;
10 Cyclopedia of Federal Procedure, Sec. 4992-3, pp. 439, 450.

It cannot be doubted on this record that if these had been the debentures of a purely local company engaged in a business not affected with a public use, the Wisconsin Courts would have "construed" them according to their tenor, as containing an absolute, not a discretionary, obligation to pay, as they were correctly construed by Judge Jerome Frank in his dissenting opinion in *Williams* v. *Green Bay & Western R. Co.,* 147 Fed. 2d 777, *reversed* 326 U. S. 549.

This Court is not limited to a mere consideration of the language used in the state court opinion but may examine and determine the real substance and effect of the decision.

See:

McCullough v. *Virginia,* 172 U. S. 102;
Louisiana R. & N. Co. v. *Behrman,* 235 U. S. 164, 170-171.

It is necessary for this Court "to examine the record in order to determine whether the judgment of the state court is based upon a non-federal ground adequate to sustain it." *Patterson* v. *Alabama,* 294 U. S. 600, 602.

See also:

Ward v. *Love County,* 253 U. S. 17, 22-23.

In the caption to subdivision C of their Point I, respondents omit the very important element of the rule in *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52, that "the ground independent of a federal question is sufficient in itself to sustain it."

Fox Film Corp. v. *Muller,* 296 U. S. 207, is clearly distinguishable. There the decision rested on an independent and sufficient non-federal ground, and the case was in effect disposed of before the federal question was reached.

In *Honeyman* v. *Hanan,* 300 U. S. 14, it was held that this Court will examine the record—not merely the decision of the State Court—and determine for itself whether a federal question is involved.

Furthermore, this case arises from what are in fact interstate transactions. It involves the rights of security holders in relation to nationally distributed securities listed with the Securities and Exchange Commission and traded on national stock exchanges. Such securities are now regulated by the Interstate Commerce Commission and the Securities and Exchange Commission. See the dissenting opinion of Mr. Justice Rutledge in *Guaranty Trust Co.* v. *York,*

326 U. S. 99, at pp. 117-118; Interstate Commerce Act, 49 U. S. C. A., Section 20a.

Replying to Respondents' Point II.

Of the six decisions cited by respondents, two are the decisions of the Wisconsin Courts in this case, which petitioners now seek to review. The other four are decisions of *Federal courts.*

Williams v. *Green Bay & Western Railroad Company* (CCA 2nd), 147 Fed. 2nd 777, was *reversed* by this Court in 326 U. S. 549, and the construction of the covenant sued on herein was expressly left open. We respectfully submit that the dissenting opinion of Circuit Judge Frank in that case correctly construes the Debentures.

Williams v. *Green Bay & Western Railroad Company* (U. S. D. C. So. D. N. Y.), 68 Fed. Supp. 509, followed the decision of the Wisconsin Supreme Court in the instant case. Respondents are trying to lift themselves by their own bootstraps in citing it to support the very decision on which it rests.

Green Bay and Western Railroad Company v. *Commissioner of Internal Revenue,* 3 T. C. 372, 147 Fed. 2nd 585 (CCA 7th), was a tax case. Present counsel for the railroad at first argued in their brief in that case that the Debentures gave the directors no discretion, but in their *reply brief* in the Circuit Court of Appeals, filed after the commencement of the litigation on behalf of the B Debenture holders, they changed their position and conceded the government's contention that the directors had discretion. That

issue was thus not contested before the Circuit Court of Appeals. Although a substantial tax liability of the railroad resulted from that decision, no application was made to this Court for certiorari to review it.

CONCLUSION.

The petition for a writ of certiorari herein should be granted.

Respectfully submitted,

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